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CASE NO.: 94-2037

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DR. JAMES FRANKLIN, ET AL.,

APPELLANTS,

VS.

GOVERNOR DAVID BEASLEY, ET AL.,

APPELLEES.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

APPELLEES' MOTION TO DISMISS

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ADDITIONAL AUTHORITIES

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MOTION

The Appellees, Jeffrey Lawrimore, George Sutton, Wesley Kennedy, James Guy, Sarah Gallaway, M. B. Lee, Jr., and Terry Welch, Mayor and Council Members of Hemingway, respectively; Mayor and Town Council of Hemingway; Election Commission of Hemingway, Manning Patterson and Betty Patterson, Election Commissioners of Hemingway, move the Court to dismiss this appeal on the grounds that the Order of the Three-Judge District Court denying the Appellants' attorney's fees is not directly appealable to the Supreme Court under the provisions of 28 U.S.C. §1253 nor under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, but should be appealed to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. §1294.

FACTUAL BACKGROUND

The Appellants are the Superintendent of Education for Williamsburg County, several members of the Williamsburg County School Board, and several students attending Williamsburg County schools. On October 19, 1993, the Appellants instituted suit against numerous defendants alleging several causes of action. The first four causes of action were against the Appellees. The first cause of action alleged that the actions of the Appellees in annexing several areas into the Town of Hemingway without obtaining preclearance was in violation of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. The

second cause of action alleged that the annexations by the Town violated the Appellants' rights guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution. The third cause of action alleged the annexations by the Town violated Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments to the Constitution. The fourth cause of action alleged the actions of Appellees in annexing areas into the Town of Hemingway were for the purpose of denying black persons equal access to public services in violation of the Thirteenth and Fourteenth Amendments to the Constitution. A fifth cause of action was against the Governor of South Carolina and Appellees, alleging that the Town's annexations, together with the Governor's Executive Order scheduling a referendum on whether a portion of Williamsburg County should be annexed into Florence County was in violation of Section 2 of the Voting Rights Act. A sixth cause of action was against the Governor, alleging his issuance of the Executive Order concerning the County annexation referendum without preclearance was in violation of Section 5 of the Voting Rights Act.

The Appellees answered acknowledging that the Town of Hemingway had annexed several areas into the Town without obtaining preclearance and that this was in violation of Section 5 of the Voting Rights Act. The Appellees raised as a defense that a prior action had been instituted in the United States District Court for the District of South Carolina, Civil Action No. 4:93-2733-21, captioned: South Carolina Conference of

Branches of the NAACP, Williamsburg County Branch of the NAACP, Nesmith Branch of the NAACP, Stanley S. Pasley, Leroy Barcus, James Gilliard, Victor Nesmith, Reddick Williams, Bertha Gordon, Jackie McKnight, Leroy Wilson, and Patricia Washington v. Mayor and Council of Hemingway, South Carolina; Jeffrey Lawrimore, George Sutton, Wesley Kennedy, James Guy, Sarah Galloway, M.B. Lee, Jr., and Terry Welch, Mayor and Council Members respectively of Hemingway; Election Commission of Hemingway; Manning Patterson, and Betty Patterson, Election Commissioners of Hemingway; that the causes of action in that prior pending litigation were the same as the first four causes of action in the instant litigation; and that the instant litigation was duplicitous and wasteful of judicial effort.

In the NAACP case, the Plaintiffs moved for Summary Judgment on the cause of action based on Section 5 of the Voting Rights Act. The Defendants entered into a Consent Order in which the Town agreed to refrain from conducting elections in which residents of unprecleared areas voted until the annexations were precleared. The Order was entered on February 22, 1994.

The Appellants moved for Summary Judgment in this case also on the grounds that the Town's failure to obtain preclearance for the annexations violated Section 5 of the Voting Rights Act. The Appellees resisted that motion on the grounds that the Ap-

pellants as Superintendent of Education, School Board Members, and students were not registered voters and lacked standing to assert the Section 5 Voting Rights Act issues. That Motion for Summary Judgment was never ruled upon.

On January 7, 1994, the Appellants amended the Complaint to assert an additional cause of action against the Hemingway Annexation Steering Committee and against Edwin Huggins, Willard Lawrimore, and J. Wesley Kennedy as members of the Hemingway Annexation Steering Committee alleging that the Committee's actions in seeking to have a portion of Williamsburg County annexed into the adjacent Florence County was in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

In July of 1994, the Department of Justice denied preclearance of five of the annexations by the Town of Hemingway. Those areas are no longer considered within the town limits. The Department of Justice also denied preclearance of the county annexation effort.

On September 29, 1994, the Three-Judge District Court dismissed all Section 5 causes of action as moot, ending all actions brought under 42 U.S.C. §1973c. On November 2, 1994, the Appellants petitioned for attorney's fees pursuant to§1973*l*(e). By Order dated March 10, 1995, the Three-Judge Panel of the United States District Court for the District of South Carolina

denied the Appellants' petition for attorney's fees.

The Appellants filed a notice of appeal of denial of attorney's fees for Section 5 issues to this court and a notice of appeal of denial of attorney's fees for Section 2 issues to the Fourth Circuit Court of Appeals.

ARGUMENT

Appellants seek to invoke the jurisdicition of the Supreme Court under 28 U.S.C. §2284 and 42 U.S.C. §1973c. Neither statute provides a basis for the Supreme Court to have jurisdiction to hear the denial by a District Court of a request for attorney's fees.

Changes by a covered jurisdiction in a standard, practice, or procedure with respect to voting is subject to the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973. That section provides, in part:

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Section 2284 of Title 28 provides for the composition of a three-judge district court, the method of appointment, and the authority of a single judge to act for the three-judge court. This section makes no provision for appeals.

In this case, the Appellants raised issues under Section 5 of the Voting Rights Act. The Three-Judge District Court dismissed those issues as moot in its Order of September 29, 1994. Any appeal from that order would have been appealed to the Supreme Court. No appeal was taken.

After all issues raised under 42 U.S.C. §1973c were dismissed as moot, Appellants petitioned for attorney's fees pursuant to 42 U.S.C. §1973*l*(e). There is no statutory provision for an appeal from the District Court's action on a petition for attorney's fees to be made to the Supreme Court. The appeal provisions of 42 U.S.C. §1973c are not applicable because the application for attorney's fees is not an action under Section 5.

Likewise, 28 U.S.C. §1253 does not confer jurisdiction to the Supreme Court to hear an appeal from the denial of attorney's fees. That section provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by Act of Congress to be heard and determined by a district court of three judges.

Appellants are not appealing the granting or denying of an injunction. This jurisdictional provision has no application to an appeal from the denial of attorney's fees alone. Supreme Court

of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 736, n.16 (1980).

An appeal of a three-judge court order on attorney's fees lies to the Court of Appeals for the circuit embracing the district. 28 U.S.C. §1294. It does not lie to the Supreme Court. Clinton v. Jeffers, 503 U.S. 930 (1992); Watkins v. Fordice, 7 F.3d 453(5th Cir. 1993).

CONCLUSION

The Three-Judge District Court dismissed as moot the Appellants' actions arising under Section 5 of the Voting Rights Act. The District Court's order denying attorney's fees sought under 42 U.S.C. §1973*l*(e) is appealable to the Fourth Circuit Court of Appeals, not the Supreme Court. The appeal should be dismissed for lack of jurisdiction.

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